FILE COPY.

FILED
JUL 25 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 280.

SAMUEL A. SALVAGE,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN G. JACKSON,
WILLIAM H. WHITE, JR.,
GEORGE B. BROOKS,
Counsel for Petitioner.

INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2-3
Statement	3
Specification of errors to be urged	4
Reasons for granting the writ	4
Appendix	7

CITATIONS.

Cases:

Avery *v.* Commissioner, 22 F. (2) 6	6
Griffiths *v.* Commissioner, 70 F. (2) 946	6
Heiner *v.* Crosby, 24 F. (2) 191	5
Helvering *v.* General Utilities and Operating Co., C. C. A. 4th, decided Jan. 8, 1935	6
Tricou *v.* Commissioner, 68 F. (2) 280	6
Wilson *v.* Bowers, 57 F. (2) 682	5

Statutes:

Act of Feb. 26, 1926, c. 27, Sec. 1003, 44 Stat. 110	3

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1935.

No.

SAMUEL A. SALVAGE,
Petitioner,
against
GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above named petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on March 25, 1935, reversing the decision of the Board of Tax Appeals in part. The Commissioner has likewise petitioned this Court for a like writ (No. 173 October Term) and, if said petition is granted, the entire cause will not be before the Court for consideration unless this writ is granted (*Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329).

Opinions Below.

The opinion of the Board of Tax Appeals (R. 49-56) is unreported. The opinion of the Circuit Court of Appeals (R. 135) is reported in 76 F. 2nd, 112.

Jurisdiction.

The judgment of the Circuit Court of Appeals, reversing the decision of the Board of Tax Appeals in part and affirming it in part, was entered on March 25, 1935 (R. 140). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

On December 30, 1922, petitioner acquired 1,500 shares of the stock of The Viscose Company, paying $100. a share therefor, under a contract which gave the seller the right to repurchase five-sevenths of said stock at $100. a share in equal installments in each of the succeeding five years. On the same day said stock was exchanged for 6,000 shares of the preferred stock and 7,500 shares of the common stock of American Viscose Corporation. The repurchase option was transferred to the new stock but never exercised. The preferred stock was redeemed in 1929. The questions are:

1. Whether the proper cost base of said preferred stock so redeemed should be arrived at by an apportionment of (1) the true value of or (2) the cash paid for The Viscose Company stock.

2. Whether the Circuit Court of Appeals exceeded its jurisdiction in making the finding of such value.

Statutes Involved.

The statutes involved are set forth in the appendix to the petition of the Commissioner in this cause, and in addition, there is involved Section 1003, Act of February 26, 1926, Chap. 27, 44 Stat. 110, as follows:

> "Sec. 1226. *Courts vested with jurisdiction; review; powers of reviewing court.* (a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdic-

tion to review the decisions of the board (except as provided in section 346 of Title 28); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 347 of Title 28.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require. (Feb. 26, 1926, c. 27, Sec. 1003, 44 Stat. 110.)"

Statement.

The following facts are taken from the stipulation of facts, and the deposition of the taxpayer:

On December 30, 1922, the petitioner, an officer and employee of The Viscose Company, purchased from that company 1,500 shares of its stock, paying $100. a share therefor (R. 25). The contract of purchase provided in effect that he would not during his life engage in any competing activity, and gave to the company the right to repurchase one-seventh of said stock during each of the succeeding five years (R. 29). On the same day this stock was exchanged, on a non-taxable exchange, for 6,000 shares of preferred stock and 7,500 shares of the common stock of American Viscose Corporation, subject to the same option to repurchase. The option to repurchase was never exercised (R., p. 69). In 1929 the preferred stock was redeemed, together with a few other shares held by petitioner, and petitioner received $660,000. for said 6,000 shares of preferred stock.

The Commissioner found the actual value of the original stock on December 30, 1922, to be $1,164.70 per share. He allocated the actual value to the new common and preferred shares in the usual method, and this determined the portion of the cash paid ($100. per share) attributable to each class of new stock, namely $9.4445 for each share of preferred and $12.4444 for each share of common. As a result of this

apportionment, he found a deficiency of $12,005.38. Before the Board of Tax Appeals petitioner contended, among other things, that the difference between $100. per share paid by him for the old stock and the value of $1,164.70 per share fixed by the Commissioner, represented additional compensation to him under his contract, and was not subject to tax for the year 1929.

The Board upheld the Commissioner's contention that such difference in value did not represent such compensation. The Circuit Court of Appeals sustained the petitioner to the extent of holding that such difference in value was received by petitioner in respect to the two-sevenths of the stock which became his absolutely in December of 1922, but held that as to the five-sevenths of the stock which was subject to the option of repurchase at $100. a share, the fair market value was the option price, and not the price fixed by the Commissioner.

Specifications of Error to Be Urged.

The petitioner submits that the Circuit Court of Appeals erred:

1. In holding that the cost base of the preferred stock of American Viscose Corporation redeemed in 1929 was to be arrived at by taking as the fair market value of The Viscose Company stock the sum of $100. per share insofar as the five-sevenths of said stock which was subject to the option to repurchase was concerned.

2. In making a finding as to the value of said optioned stock.

Reasons for Granting the Writ.

(a) As to Specification 1.

The fundamental question before the Court on the claim for refund was the question of what figure should be used as representing the cost to the taxpayer of the preferred stock redeemed in 1929. Upon this figure the amount of

his gain was necessarily based. It would make no difference whether the figure was arrived at for the year 1922, or in part, for the several years succeeding, as the option expired. The Commissioner used the value of the old stock as of December 30, 1922, to wit, $1164.70 per share, and conceded that the difference of $1,064.70 would constitute taxable income, if it was held to be compensation for services (R. 137). The Circuit Court, however, despite this concession, limited the value of five-sevenths of said stock to $100 per share, the option price. It is submitted that the Court overlooked the fundamental question. Even assuming that the value to the taxpayer of this stock on December 30, 1922 was only $100 per share by reason of the existence of the option, nevertheless, as the option expired as to the several parts of the stock, and the stock came into the possession of the taxpayer without restriction, necessarily a new cost base was established. The record shows (R., p. 73) the continuous and tremendous growth of the company's business during the years in which the option existed. Clearly the value of the stock was intrinsically at least as great as the value on December 30, 1922.

The only reported case which we have found is *Wilson* v. *Bowers*, 57 F. (2) 682, the case upon which the Circuit Court based its decision. This was an inheritance tax case, and so far as we can find, the question has not been passed on in connection with income tax. In that case there was no relationship of employer and employee, and no contract restricting the employee's activities. The record shows that it was not intended that the option be exercised if taxpayer continued his services (R. fol. 208). Fair market price or value of corporate stock for income tax purposes is a fact question depending on circumstances. *Heiner* v. *Crosby*, 24 F. (2) 191. The possibilities of tax avoidance or evasion existing if the rule of *Wilson* v. *Bowers* is adopted, are obvious.

It is submitted that an important question not heretofore determined by the Court exists and the writ should be granted.

(b) As to Specification 2.

The jurisdiction of the Circuit Court is limited to a review of questions of law. *Avery* v. *Commissioner,* 22 F. (2) 6; *Tricou* v. *Commissioner,* 68 F. (2), 280, 286. While in certain cases the Circuit Court has considered questions not raised below, such questions are only considered when all the facts relevant thereto are before the Court. *Helvering* v. *General Utilities and Operating Co.,* C. C. A. 4, Jan. 8, 1935; *Griffiths* v. *Commissioner,* 70 F. (2) 946. The only fact apparently considered by the Court in this instance was the contract itself. The circumstances relating to the value of the stock on the several dates of the expiration of the option were not in evidence, except as above indicated. If the theory of the Court were sound, namely, that the stock only had a market value of $100 per share on December 30, 1922, then necessarily there must have been a change in this value as of the several subsequent dates. The Court should either have adopted the value taken by the Commissioner, which was in evidence before it, or remanded the matter for further testimony as to value upon the subsequent dates.

CONCLUSION.

For the reasons above stated, we respectfully submit that this petition should be granted.

JOHN G. JACKSON,
WILLIAM H. WHITE, JR.,
GEORGE B. BROOKS,
Counsel for Petitioner.

July, 1935.

APPENDIX.

REVENUE ACT OF 1928, C. 852, 45 STAT. 791.

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

REVENUE ACT OF 1921, C. 136, 42 STAT. 227.

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; * * *